

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JOHN GILBERT, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
APC NATCHIQ, INC., )  
 )  
Defendant. ) Case No.: 3:03-cv-00174-RRB  
 )

**QUALIFIED NON-OPPOSITION TO  
PLAINTIFF'S MOTION ESTABLISHING  
HOURS WORKED AT DOCKET NO. 35**

Defendant, APC Natchiq, Inc., ("APC") by and through its attorneys, DeLisio Moran Geraghty & Zobel, P.C., files this qualified non-opposition to Gilbert's Motion Establishing Hours Worked. APC acknowledges that the burden of proving overtime hours worked has been generally described as follows:

Under the Alaska Wage and Hour Act, the employer has a statutory duty to keep records of "the rate of pay and the amount paid each pay period to each employee [and] the hours worked each day and each workweek by each employee . . . ." AS 23.10.100(a). Musarra cites cases interpreting the federal Fair Labor Standards Act in support of his position that where an employee fails to keep the required records, the employee has only the initial burden of producing sufficient evidence to show the amount and extent of work for which he was improperly compensated. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed, or evidence sufficient to negate the reasonableness of the inference to be drawn from the employee's evidence. See, e.g., Mumbower v. Callicott, 526 F.2d 1183 (8th Cir. 1975); Hodgson v. American Concrete Co., Inc., 471 F.2d 1183 (6th Cir. 1973); Shultz v. Hinojosa, 432 F.2d 259 (5th Cir. 1970).

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Alaska Int'l Indus. v. Musarra, 602 P.2d 1240, 1248 (Alaska 1979). Gilbert intimates that APC did not maintain the required records under Alaska's Wage and Hour Act. The exhibits submitted by Gilbert establish the contrary.

APC kept detailed time and payroll records for Gilbert. See Plaintiff's Exhibit (Deposition of Christopher Boyle, p. 42); see also payroll records submitted with Plaintiff's motion. However, because Gilbert was considered exempt from overtime, APC did not track work performed on an hourly basis. The expectation was that Gilbert's hours would vary depending upon the needs of the job, and that he would receive the set day rate for all hours worked. See Plaintiff's Exhibit (Deposition of Douglas Smith, p. 70). Thus, APC did not maintain records of Gilbert's hours because it was not required.

APC does not dispute the "daily logs" Gilbert offers as evidence of alleged overtime. It does, however, dispute the contention that the absence of records regarding Gilbert's hours constitutes a statutory violation.

DATED this 28<sup>th</sup> day of August, 2006, at Anchorage, Alaska.

DeLISIO MORAN GERAGHTY & ZOBEL, P.C.  
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/s/ Patricia L. Zobel

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This is to certify that a true copy of the foregoing was served via electronic service or U.S. Mail this 28<sup>th</sup> day of August, 2006, to the following:

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105069 - Non-Opposition to Motion to Establish Hours Worked at Docket No. 35  
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